THE ATTORNEY GENERAL
OF TEXAS

AUSTIN, TEXAS 78711

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ATTORNEY GENERAL

April 27, 1973

Honorable L. DeWitt Hale
Chairman, Judiciary Committee
House of Representatives
Austin, Texas 78767

Letter Advisory No. 24

Re: Constitutionality of H. B. 470 relating to legal representation for county officials and employees in certain suits.

Dear Representative Hale.

You have requested our review of H. B. 470 pending before the Judiciary Committee. It would provide for the defense (unless declined) of county officials and employees by district or county attorneys, or by county-paid private counsel, in certain lawsuits brought against them by non-political entities. Sections 2 and 3 of the bill read:

> "Sec. 2. In any suit instituted by a non-political entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall represent the official or employee of the county if the suit involves any act of the official or employee while in the performance of public duties.
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> "Sec. 3. If additional counsel is necessary or proper for an official or employee provided legal counsel by Section 2 of this Act, the County Commissioners may employ and pay private counsel."

You state that section 3 of the bill causes your concern and brought about your request for our opinion. To put the matter in perspective, it is necessary to review the constitutional roles of county and district attorneys in Texas.

The Constitution, Article 5, Section 18 speaks to the matter of county and district attorneys representing the interests of the State, not the

County, in matters before the district and county courts. In the absence of a statute commanding it, or an agreement between him and the commissioners court calling for it, a county or district attorney has no obligation or right to defend county interests in court, and the county may employ private counsel to protect such interests to the exclusion of such legal officers.

The Legislature may however, assign such legal officers additional duties consistent with their constitutional duties. Where the Legislature has done so, the commissioners court, a subordinate body, cannot interfere with the discharge of such duties; and unless the Legislature has specified otherwise, any private attorneys employed by the county commissioners in connection therewith may act only under the direction of the officer.

Assuming the interests of the State are not involved, we think the Legislature may fashion, as it sees fit, the role it gives to county and district attorneys in defending county interests. However, no attorney, public or private, can be authorized or paid out of public funds to represent private rather than public interests.

The legislative command that the officer represent the official or employee "if the suit involves any act of the official or employee while in the performance of public duties", to be valid, must mean "while acting within the scope of his authority in the performance of public duties." Unless the officer or employee acts within the scope of his authority, he does not truly act in his public capacity.

Public money cannot be spent to defend private interests. Article 3, Section 52 of the Constitution specifies that the Legislature cannot authorize counties to grant public money or a thing of value in aid of any individual, and Article 3, Section 51 places similar restrictions on direct grants by the Legislature. Of course, suits may be only nominally against individuals when they are really designed to obstruct or control the legitimate performance of official duties. Such litigation does involve the interests of the county, and there is no constitutional prohibition against the use of public funds to defend a county's interest in a legal contest, even if the county is not named as a party to the suit. However, if only the private interests of the defendant officer or employee are at stake, no defense could be provided, even though the act which precipitated the suit occurred while

the officer or employee was ostensibly engaged in the performance of public duties. The public has no liability for the acts of an officer or employee acting outside of (or beyond) the scope of his legal powers, and ordinarily it has no interest in protecting him from the consequences of such acts. But representation of a county official or employee believed in good faith by the attorney to have been acting within the proper scope of his authority is not illegal even though such confidence may prove to have been misplaced.

See City National Bank of Austin v. Presidio County, 26 S. W. 775 (Tex. Civ. App., 1894, no writ); Terrell v. Greene, 31 S. W. 631 (Tex. 1895); Brady v. Brooks, 89 S. W. 1052 (Tex. 1905); Jones v. Veltmann, 171 S. W. 287 (Tex. Civ. App., San Antonio, 1914, writ refused); Maud v. Terrell, 200 S. W. 375 (Tex. 1918); Gibson v. Davis, 236 S. W. 202 (Tex. Civ. App., Galveston, 1921, no writ); City of Corsicana v. Babb, 290 S. W. 736 (Tex. Comm. 1927); Nunn-Warren Publishing Co. v. Hutchinson County, 45 S. W. 2d 651 (Tex. Civ. App., Amarillo, 1932, writ refused). Camp v. Gulf Production Co., 61 S. W. 2d 773 (Tex. 1933); State v. Averill, 110 S. W. 2d 1173 (Tex. Civ. App., San Antonio, 1937, writ refused); City of Del Rio v. Lowe, 111 S. W. 2d 1208 (Tex. Civ. App., San Antonio, 1937, reversed on procedural point, 122 S. W. 2d 191); Harris County v. Hall, 172 S. W. 2d 691 (Tex. 1943); Agey v. American Liberty Pipe Line Co., 172 S. W. 2d 972 (Tex. 1943); Cobb v. Harrington, 190 S. W. 2d 709 (Tex. 1945); Neal v. Sheppard, 209 S. W. 2d 388 (Tex. Civ. App., Texarkana, 1948, writ refused); Travis County v. Matthews, 235 S. W. 2d 691 (Tex. Civ. App., Austin, 1950, writ ref., n. r. e.); Garcia v. Laughlin, 285 S. W. 2d 191 (Tex. 1955); Eubanks v. Wood, 304 S. W. 2d 567 (Tex. Civ. App., Eastland, 1957, writ ref., n. r. e.); Hill Farm, Inc. v. Hill County, 425 S. W. 2d 414 (Tex. Civ. App., Waco, 1968, affirmed 436 S. W. 2d 320); Attorney General Opinions O-3656 (1941), O-6534 (1945), O-7474 (1946); 20 Tex. Jur. 2d. 305, District and Prosecuting Attorneys, Section 15, et seq.

In sum, it is our conclusion that, if it were enacted, the courts would hold the statute to be constitutional, but would limit its operation to those circumstances where the interests of the county, not in conflict with those of the state, are at stake, and where there is a good

faith showing that the individual sued was acting within the scope of his authority in the performance of public duties.

Very truly yours,

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APPROVED:

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Opinion Committee